UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO

Respondent

Case 07-CB-226531

and

MICHIGAN INFRASTRUCTURE AND TRANSPORTATION ASSOCIATION, INC.

Charging Party

RIETH-RILEY CONSTRUCTION CO., INC.

Respondent

Case 07-CA-234085

and

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO

Charging Party

_____/

UNION'S BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S MOTION TO SEVER CASES AND WITHDRAW COMPLAINT IN CASE 07-CB-226531

Local 324, International Union of Operating Engineers (IUOE), AFL-CIO (Union), by its attorneys, supports Counsel for the Acting General Counsel's motion to sever the above-captioned cases and to withdraw the Complaint in Case 07-CB-226531.

Background

It has been established in the hearing of Case 07-CA-234085 to this point that prior to 2018

the Union and Michigan Infrastructure and Transportation Association (MITA) and its predecessors bargained for decades on a multi-employer basis. The most recent MITA collective bargaining agreements expired in May and June of 2018. In early May 2018 the Union notified MITA that it was withdrawing from multi-employer bargaining as to the MITA Road and Distribution Agreements. Notwithstanding this withdrawal, MITA and its contractor-members continued to pursue multi-employer bargaining, making proposals on behalf of the group, and eventually as a group locking out employees on September 4, 2018. In locking out employees MITA told the Union and employees the lockout would end when the Union ratified their multi-employer agreement.

Early in 2018 most of the contractor-members of MITA who had given power of attorney to MITA signed a Multi-Employer Bargaining Agreement[1] which committed the signatories to bargaining as a group, and prohibited each signatory from bargaining with the Union on an individual basis.

Issuance of Complaint in Case 07-CB-226531

The issuance of the Complaint in Case 07-CA-226531 is best examined in the context of the labor dispute herein and the timing of the Region's involvement. Although the dispute between the Union unfolded in May and June 2018 MITA did not seek the Region's involvement until shortly

---

[1] Counsel for the Acting General Counsel adopts Respondent Rieth-Riley's terminology for this agreement as the "All for One" agreement. The title of the document is:

Labor Relations Divsion of the Michigan Infrastruacture & Transportation Association

MULTI-EMPLOYER BARGAINING AGREEMENT

(E.g. GC Ex 77 [capitalization, emphasis and spacing in original]). The Union will refer to it herein as the Multi-Employer Bargaining Agreement.

before and after the lockout began in September 2018. The first unfair labor practice charge filed by MITA's current attorneys was filed by MITA on August 28, 2018 in Case 07-CB-226351 alleging violations of 8(b)(1)(B) and 8(b)(3).[2] MITA filed three more unfair labor practice charges in September 2018, two secondary boycott "CC" cases and a second "CB" case involving allegations of 8(b)(1)(A) and 8(b)(1)(B) and 8(b)(3).[3] (U Ex 27, 28, 29) All of these charges filed by MITA against the Union contained a request for injunctive relief under Section 10(j) of the Act. Although the charges contained only statutory language, the allegations investigated by the Region can be inferred from the dismissal letters of these cases. (Id) Essentially Rieth-Riley asserts as its defense in the lockout case the unfair labor practices allegations that were dismissed by the Region, appealed and upheld on appeal as well as the allegations of Case 07-CB-226531 Amidst the flurry of investigations in fall 2019, the Region apparently found evidence of statements that it concluded arguably violated 8(b)(1)(B), to the effect that the Union would not bargain with a contractor unless the contractor withdrew its power of attorney from MITA.

As noted by Counsel for the Acting General Counsel in his brief, a statement that a Union will not bargain with an Employer if it chooses a particular representative can violate the Act, although the Ironworkers[4] case cited for that proposition by the Counsel for the Acting General Counsel is distinguished from the allegations in Case 07-CB-226531 in that the alleged refusals to bargain were

---

[2] Another unfair labor practice charge was filed on August 24, 2018 in Case 07-CB-226495. against the Union on behalf of MITA by Melissa VanGessel, an attorney at the Bodman law firm which employed MITA's attorney Don Scharg. That charge alleged violations of 8(b)(1)(A) and 8(b)(1)(B) and requested 10(j) injuctive relief. This charge was withdrawn on November 20, 2018.

[4] 211 NLRB 128 (1974).

made in response to and in the context of a specific request to bargain, absent herein.

At the end of the investigation of MITA's initial four charges after the intervention of the Governor of the State of Michigan in ending the lockout, on December 26, 2018, the Region issued a Complaint in Case 07-CB-226531 alleging Union agents made statements to the effect that it would not bargain with a particular contractor unless it withdrew its power of attorney from MITA. The theory of the Complaint was that although the Union was permitted to refuse to bargain with MITA on a multi-employer basis, it was not permitted to refuse to bargain on an individual basis with a contractor designating MITA as its individual bargaining representative. While such a theory may have been technically defensible it ignored the reality of the understanding of the participants as to MITA's role in bargaining as the representative of the group, not individual contractors.

The statements were alleged to have been made by four Union agents to representatives of six employers, none of which were Rieth-Riley. While the Union denied the alleged statements, a Complaint issued in accordance with the General Counsel's policy on not resolving credibility issues during an investigation, but leaving them to the hearing.[5] Thus the Complaint in 07-CB-226531 was the Region's initial foray into this litigation herein at a time when it had not developed all the facts related to the lockout or bargaining. Subsequent investigations by the Region, including Case 07-CA-234085 filed on January 11, 2019 by the Union, the lockout case, revealed events that caused the Region to issue the Complaint in Case 07-CA-234085.

Missing from the Region's initial analysis upon issuance of the CB case was an important piece of evidence, not provided by MITA to the Region during its investigations transpiring over a four

[5] The Union continues to deny the allegations. Nothing herein should be construed to the contrary.

month period, or initial trial preparation, specifically, the confidential Multi-Employer Bargaining Agreement which bound signatories to multi-employer bargaining and prohibited them from engaging in individual bargaining with the Union.

The Union's consistent position since May 2018 was that it wanted to negotiate individual collective bargaining agreements with each contractor, that it would not engage in multi-employer bargaining as demanded by MITA. This position was clearly understood by contractors, as evidenced by the testimony of Mark Johnston, President of Ajax and MITA Labor Relations Division representative:

> [Stockwell] was pretty steadfast that he only wanted to talk to contractors. He really wanted to negotiate individual contracts . . . Mr. Stockwell always wanted to negotiate individually . . . .

(Tr 1048-49).

It is evident from Johnston's testimony that he not only understood the Union's demand for individual bargaining, he equated the concept of bargaining with contractors as bargaining individually.

Similarly, witnesses offered by Rieth-Riley and MITA testified that sometimes the term bargaining with MITA was used and understood as being synonymous with multi-employer or group bargaining. While the intricacies of labor law may have escaped the contractors, they understood that MITA bargained as a group and the Union didn't want to bargain as a group. They also understood that MITA didn't bargain on an individual basis. (E.g. 683-84, 1298-1300)

Legal Standard

The General Counsel has unreviewable discretion to withdraw a complaint even if the hearing has opened, so long as no evidence has been presented on the allegations, absent an argument that the

complaint pleadings alone would permit a legal decision.[6] Sheet Metal Workers Association, Local Union 28, 306 NLRB 981 (1992).

Analysis

Under this standard Counsel for the Acting General Counsel's motion to withdraw the Complaint should be granted as the General Counsel's discretion is unreviewable.

In the CB case the hearing has opened, and Counsel for the General Counsel has made technical and housekeeping amendments to the Complaint, but Respondent Union has not modified the Union's answer as required by the amendments; such was deferred until such time as Counsel for the Acting General Counsel presented his "case in chief." (Tr 21) Opening statements have not been made with respect to Case 07-CB-226531. (Tr 32) No evidence has been elicited by Counsel for the Acting General Counsel in support of its Complaint. And while Counsel acknowledged that he might not call witnesses but would rely on witnesses presented by MITA and Rieth-Riley the undersigned objected that he would at least have to identify witnesses and tesitmony relied on to permit due process to the Union. That point was never reached.

While Counsel for the Acting General Counsel has, now, in his motion and brief, identified witnesses who would present testimony as to the allegations of the Complaint, prior to this the undersigned could only guess at the identity of the witnesses and whether the testimony offered by Respondent Rieth-Riley was the same that would have been offered by Counsel for the Acting General Counsel had we reached his case in chief. Although he reserved the right to recall witnesses, the undersigned was unaware whether these witnesses were witnesses with direct testimony about the

[6] No such argument can be made here as the factual allegations have been denied by the Respondent Union.

allegations or who would testify to other supportive evidence.

The fact that testimony was presented by MITA and Rieth-Riley does not satisfy the requirement that evidence be presented as Rieth-Riley does not control the presentation or argument of the General Counsel's case. No evidence was offered by Counsel for the Acting General Counsel or identified as the evidentiary basis for the allegations. The fact that it now appears that Rieth-Riley offered some of the evidence on which Counsel for the General Counsel could have relied, should not dictate a different result.

In the alternative, even if this case is viewed as one in which the Judge must grant approval for the withdrawal of the Complaint such motion should be granted. The Acting General Counsel has made a reasoned decision based on evidence not available to it when the original decision was made, as well as additional investigation, and cross-examination of witnesses, that the allegations of the Complaint cannot be sustained. The Acting General Counsel's motion carefully delineates the factors supporting this decision including its late knowledge of the Multi-Employer Bargaining Agreement. Even after all evidence has been presented, a Judge may exercise judicial discretion to permit withdrawal of a Complaint. Greyhound Lines, (235 NLRB 1100, 1112 (1978).

The Judge need not agree with the General Counsel's view of facts and law to grant this Motion but rather only find that the initial decision in such a case is for the General Counsel and it is a reasonable within its prosecutorial discretion based on the explanation offered. If the Judge grants the motion presumably the Regional Director will dismiss the underlying charge and the Charging Party will have the right to appeal. The Judge's decision in this regard is reviewed under an abuse of discretion standard, it need not be correct but only the reasoning relied upon need not be arbitrary:

Because the General Counsel is not declining to prosecute an obvious violation of the

Act, the judge's decision to allow the General Counsel to withdraw these complaint allegations was reasonable and within her discretion.

Verizon Wireless, 369 NLRB 108, slip op at 3 (2020).

The Union urges that Counsel for the General Counsel's motion to sever Case 07-CB-226531 and withdraw the Complaint therein be granted.

Respectfully submitted this 5th day of April, 2021.

Amy Bachelder
NICKELHOFF & WIDICK, PLLC
Attorneys for Local 324
333 W Fort, Suite 1400
Detroit, MI 48226
(313) 496-9408
abachelder@michlabor.legal

Dated: April 5, 2021

CERTIFICATE OF SERVICE

AMY BACHELDER, being first duly sworn, deposes and says that on the 5th day of April she served a copy of Union's Brief in Support of Acting General Counsel's Motion to Sever Cases and Withdraw Complaint in Case 07-CB-226531 upon the following via email:

Stuart R. Buttrick, Esq.:	Via email:	stuart.buttrick@FaegreBD.com
Ryan J. Funk,. Esq.:	Via email:	ryan.funk@FaegreBD.com
Brian Paul, Esq.:	Via email:	brian.paul@faegredrinker.com>
Alex Preller, Esq.:	Via email:	alex.preller@FaegreBD.com
Robert Drzyzga, Esq.:	Via email:	robert.drzyzga@nlrb.gov
Scott Preston, Esq.:	Via email:	Scott.Preston@nlrb.gov

Amy Bachelder
NICKELHOFF & WIDICK, PLLC
Attorneys for Local 324
333 W Fort, Suite 1400
Detroit, MI 48226
(313) 496-9408
abachelder@michlabor.legal

Dated: April 5, 2021